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No. 87-1211 (3)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

TERRANCE L. GUIDER,
Petitioner,

v.

RONALD SMITH AND THE CITY OF DETROIT,
Respondents.

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

PETITIONER'S REPLY BRIEF

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I.
THE PETITION IS NOT JURISDICTIONALLY DEFECTIVE

This short reply brief is submitted by Petitioner Terrance L. Guider to address Respondents' contention that an error made in the wording of Guider's petition deprives this Court of jurisdiction to consider its merits. The petition, as originally filed, said "On Writ of Certiorari to the Supreme Court of Michigan" although Guider's intent is and was to seek review of a federal question incorrectly decided by the Michigan Court of Appeals (26a-27a), a decision which the Supreme Court of Michigan then declined to exercise its discretionary jurisdiction to review (30a).

The error on the cover of the petition was overlooked by the Clerk and Guider did not become aware of it until receiving Respondents' brief in opposition (Resp. Br. 1-8). Because Respondents have chosen to make their "jurisdictional" issue the lead issue in their response, this brief reply is necessary.

The error on the cover of the petition has been cured, at the suggestion of this Court's Clerk, by application of labels referring to the proper lower court. Respondents, however, continue to press their "jurisdictional" objections (Letter from Respondents to Chief Deputy Clerk Frank Lorson dated February 12, 1988). This reply will discuss the additional grounds which Respondents believe support their objections.

First, the petition *obviously* seeks review of the decision of an intermediate state appellate court, a decision which the highest court of the state declined to review. The state supreme court's refusal to exercise its discretionary jurisdiction is mentioned for two purposes only: To show that Guider exhausted his state court appellate recourse and to show that his petition was filed timely in this Court. Respondents understand this perfectly well, but assert that the petition is jurisdictionally defective because it is non-conforming in the following ways: (1) the jurisdictional statement cites only the Order of the Michigan Supreme Court (Resp. Br. 6); (2) the "Opinions Below" section cites to that Order (*id.* 7);

(3) that Order is included in the Appendix (*id.*); and (4) Guider "repeatedly" claims the decision of the Michigan Supreme Court was "on the merits" (*id.*).

Working backwards through these assertions, it is true the petition says in two places on page 4 that the Supreme Court of Michigan denied leave to appeal "on the merits," but, as footnote 3 on that page makes clear, Guider's point is that his *delayed* application for leave was denied because the Supreme Court was "not persuaded that the questions presented should be reviewed . . . [on the merits]" (30a), and *not because of the delay.*

Certainly Guider was not making the nonsensical assertion that a refusal to exercise discretionary appellate jurisdiction is a decision on the merits of a case (*see* authorities cited at Resp. Br. 7-8). Guider was saying only that the Supreme Court considered his application for leave to appeal as though it were timely under Michigan Court Rule 7.302(C)(2) rather than Rule 7.302(C)(3).[1]

Respondents point out that the Order of the Supreme Court of Michigan denying leave to appeal is included in Guider's Appendix (29a-30a) and that it is cited in both the "Opinions Below" and "Jurisdiction" sections of the petition. This was appropriate to discharge Guider's obligation to show this Court

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[1] RULE 7.302 APPLICATION FOR LEAVE TO APPEAL

(A) What to File. . . .

(B) Grounds. . . .

(C) When to File.

(1) Before Court of Appeals Decision. . . .

(2) Other Appeals. In other appeals the application must be filed within 21 days

(a) after the Court of Appeals clerk mails notice of an order entered by the Court of Appeals.

(b) after the filing of the opinion appealed from; or

(c) after the Court of Appeals clerk mails notice of an order denying a timely filed motion for rehearing.

(3) Later Application. A delayed application may be filed, it if is accompanied by an affidavit explaining the delay. However, a delayed application may not be filed more than 56 days after the Court of Appeals decision.

that he had exhausted his state appellate recourse and filed his petition within 90 days thereafter. Respondents do not mention that the appellate opinion discussed throughout the petition — the Opinion of the Michigan Court of Appeals — is cited first in the "Opinions Below" section and appears first in the Appendix (6a-28a). Clearly, the "judgment in question" mentioned in the "Jurisdiction" section is the judgment of the Michigan Court of Appeals. It is apparent from Respondents' argument on the merits (Resp. Br. 8-23) that they understand perfectly well what the legal issue at stake here is. They have made their "jurisdictional" argument in the hope this Court will review the petition in the spirit of form over substance, as though it were an ancient English writ that failed if a single word were spoken wrong or out of order.

II.
THE FEDERAL ISSUE IS CONCLUSIVE AND THE OUTCOME OF FURTHER PROCEEDINGS PREORDAINED

One final point needs to be addressed. Respondents point out that Guider does not have a final judgment against the City of Detroit. This is certainly true and Guider did not assert otherwise in the petition. What Guider did claim is that the City's loss in the Michigan Court of Appeals (24a-25a) and the Supreme Court of Michigan's refusal to review that loss (30a) means that eventually a final judgment inevitably will be entered against the City (Pet. for Cert. 4 n.2). Respondents suggest that a decision in the Supreme Court of Michigan for Officer Smith on the qualified immunity issue might somehow affect the City's liability under *Tennessee* v. *Garner,* 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), for its unconstitutional deadly force policy (Resp. Br. 3 n.2), but the suggestion makes no sense whatever. Respondents then raise the prospect of a petition by the City to this Court on the issue of *Garner*'s retroactivity (Resp. Br. 4 n.2), but the issue is not even presented in this case and in any event *Garner* unquestionably is retroactive. *E.g., Carter* v. *Chattanooga,* 803 F.2d 217, 219-224 (6th Cir. 1986); *Acoff* v. *Abston,* 762 F.2d 1543 (11th Cir. 1985).

Respondents would agree that Guider's entitlement to attorney's fees under Section 1988 has been finally decided by the Michigan courts and that it was "now or never" for his petition to this Court on the issue of attorney's fees and the "bright prospects" rule; Respondents' claim is that another ground supporting the Section 1988 decision may arise later because Guider may not remain the prevailing party. For the reasons just stated, that claim is devoid of substance. Although

> there are further proceedings—even entire trials—yet to occur in the state courts [this Court has jurisdiction] where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained. In these circumstances, because the case is for all practical purposes

concluded, the judgment of the state court on the federal issue is deemed final.

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469, 43 L. Ed. 2d 328, 340, 95 S. Ct. 1029 (1975). Guider believes that his status as the prevailing party against the City is now, in the language of *Cox*, "preordained" to continue despite any further state court proceedings.

Still, if this Court deems it inappropriate for any reason to use this case as a vehicle to consider the "bright prospects" rule *now*, before Guider actually has a formal final judgment against the City, the appropriate response would be to dismiss this petition without prejudice as having been filed prematurely.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Guider requests that this Court reject Respondents' "jurisdictional" attack on the petition. For the reasons stated in the petition itself, the question whether the "bright prospects" rule is a permissible and desirable gloss on the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, is an important issue as to which the conflict among the circuits should be resolved. Guider's petition should be granted now so that that conflict can be resolved as soon as possible. If this Court is unsatisfied with the finality of Guider's status as the prevailing party, however, Guider urges this Court to postpone a decision on the petition until any vestigial concerns with finality have been resolved, either by holding the petition in abeyance or dismissing it without prejudice as having been filed prematurely.

Respectfully submitted,

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